Supreme Court, U.S.
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No. 99-433

In The

Supreme Court of the United States

COUNTY OF ORANGE; MICHAEL S. CARONA, individually and in his official capacity as Orange County Marshal; DON SPEARS, individually and in his official capacity as Captain of the Orange County Marshal,

Petitioners,

vs.

MARK J. WEHRLI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petition for Certiorari before this Court raises no compelling issue despite defense counsel's formidable mastery of appellate advocacy. Reduced to its elemental terms, the Ninth Circuit decision follows the lead of this Court in treating the unavailability of judicial review as a significant factor in determining whether to give collateral estoppel effect to an arbitral decision. Petitioner seeks to persuade this Court to adopt the position taken in the dissenting opinion, that an unreviewable arbitral decision can indeed be given preclusive effect, so long as the forum was voluntarily elected by the party against whom preclusion is sought. Petitioner suggests that voluntariness, rather than the availability of judicial review, is the key criterion. Petitioner says this is necessary to eliminate confusion in the law.

The present case illustrates the contrary. The availability of judicial review is properly considered a major factor in determining preclusive effect, and furnishes a sensible, workable and equitable criterion. This Court itself said "the opportunity to seek court review of any adverse findings" was a factor in giving preclusive effect to an administrative decision. *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966).

Petitioner's suggested criterion of voluntariness would itself create confusion and inequity. Unlike the easily determined legal question of whether judicial review was available, the predominantly factual question of whether a party's submission to arbitration was truly

voluntary invites inquiry into a party's subjective intentions and motivations. Petitioner in this case voluntarily submitted his termination appeal to binding arbitration. If he had not, he and his family would have starved, but that does not lessen the voluntariness of his election. Or does it?

The Ninth Circuit majority reached the correct conclusion. Contrary to petitioner's concern, the Ninth Circuit did not disturb the foundations of collateral estoppel in the slightest. It recognized that "a state administrative decision can have preclusive effect upon a federal section 1983 claim." See App. 4. In *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), "review had been available under state law; the plaintiff had simply failed to avail himself of it." App. 5.

The Ninth Circuit majority reached the apex of the analysis of the "full and fair opportunity to litigate" element in finding that "with no administrative record and no judicial review, Wehrli would have no way of correcting arbitrary administrative action if any occurred." App. 7.

Finally the Ninth Circuit distinguished Wehrli's case from Elliott and other cases where plaintiff failed to take advantage of available judicial review (*Plaine v. McCabe*, 797 F.2d 713 (9th Cir. 1986); *Eilrich v. Remas*, 839 F.2d 630 (9th Cir. 1988)). Disagreeing with the County's argument that Wehrli is in the same position as a litigant who had failed to take advantage of available judicial review, the Court recognized "[t]he rules of the administrative process themselves foreclosed judicial review; Wehrli had no choice between review or no review. He did not waive

judicial review in any sense meaningful for the purposes of res judicata or collateral estoppel." App. 8.

Implicit in the Ninth Circuit's holding, the litigants who failed to take advantage of judicial review would only have needed to file an appeal to exercise the right, no meaningful sacrifice was extracted from them to preserve their appellate rights. For Wehrli to keep his hopes of state court judicial review alive, he would have had to decline the opportunity to arbitrate and forget about going back to work for the foreseeable future. Wehrli did not have significant control over the extent of his claim he would be submitting to arbitration either. He tried to keep it confined to the law of the shop, App. 22-28, but the District Court ruled he had submitted his constitutional claims anyway. App. 19.

More significantly for present purposes than the fact that the Ninth Circuit granted relief to Wehrli, the opinion leaves the settled part of the law of collateral estoppel exactly as it was. Even the dissenting opinion conceded there was no precedent giving preclusive effect to an unreviewable arbitral decision. App. 12.

Petitioner argues that "[n]evertheless and notwithstanding the undeniable judicial nature of these proceedings, and notwithstanding Respondent's voluntary election to proceed in that forum, not to mention the absence of even a suggestion of caprice in the state determinations, this administrative process has now been conclusively deemed inadequate for purposes of issue preclusion." Petn. at 6. Legal writing seminars teach that when a writer has to say something is undeniable, it is often because the point is very deniable. In this instance,

as readily recognized by the majority, the lack of review and a written record meaningfully distinguishes the arbitration before the municipal court judge from a full-fledged judicial opportunity to litigate.

Petitioner's interpretation of the holding as "conclusively" deeming the process inadequate is misleading. The Ninth Circuit's holding does not alter in the least the case-by-case approach guided by the Utah Construction factors.

Petitioner then says "[t]here is scant, if any, support for this holding." That assertion turns out to mean that the issue is a matter of first impression.

Petitioner's only newly cited cases from other circuits only refer to unreviewed, not unreviewable, administrative rulings. Petn. at 7, referring to *Crossroads Cogeneration v. Orange and Rockland*, 159 F.3d 129 (3d Cir. 1998); *Gjellum v. City of Birmingham*, 829 F.2d 1056 (11th Cir. 1987) and *Frazier v. King*, 873 F.2d 820 (5th Cir. 1989) (cited by petitioner as 9th Circuit). After quoting from these cases, petitioner concludes "[t]hus it is clear that only the Ninth Circuit has gone so far as to deny preclusive effect to state administrative adjudications of issues simply because they were not subject to judical review, regardless of the fairness and judicial nature of such proceedings." Petn. at 8. Petitioner then does not proceed to cite other circuits that have given preclusive effect to unreviewable arbitral rulings. As admitted in the Ninth Circuit dissent, there are none. Dissent at App. 12.

Petitioner next argues that the opinion below "conclusively presumes a party has not had a full and fair opportunity to litigate an issue based entirely on the

unavailability of "judicial review." Petitioner describes the decision as a "per se approach" which somehow makes the distinction between res judicata and collateral estoppel "no longer important in the Ninth Circuit, where the only question is whether or not the procedure permits subsequent judicial review of the administrative findings."

It is difficult to find a trace of this supposed per se approach in the Ninth Circuit opinion; there appears no inclination to abandon the case-by-case approach to the test of the full and fair opportunity to litigate. To be sure, the availability of review furnishes more of a bright line test than the test of voluntariness proposed by petitioner. But there is no indication that the distinction between collateral estoppel and res judicata is "no longer important." Where review and a written record are available, future cases will undoubtedly arise testing the difference and bounds between re-litigating of whole claims and re-litigating of factual issues. Perhaps a sound reason why a written record and judicial review are essential to preclusion is that without a record, it becomes difficult to determine what was actually litigated. This is particularly important where constitutional rights enter the picture.

Contrary to petitioner's policy arguments, an opportunity to litigate constitutional claims which may have been raised in the course of arbitrating law-of-the-shop issues will not open the floodgates to a second bite in federal court. Most employment grievances do not rise to the level of constitutional due process violations. It will always be far more difficult, expensive and daunting to bring a claim to federal court than to a labor arbitration. But as illustrated by the present case, there is no policy

interest compelling enough to foreclose an employee who seeks an affirmative remedy under the law of the shop without desiring to raise a constitutional issue already pending in court, from keeping the constitutional claim alive in the court while continuing to pursue his workplace remedy. Proceeding in that manner should be encouraged, not condemned, in furtherance of judicial policies favoring exhaustion of available remedies and mitigation of damages.

CONCLUSION

The essential holding of the Ninth Circuit in this case is that an unreviewable arbitral decision without a written record will not be given preclusive effect in a section 1983 federal civil rights case. The holding is totally consistent with this Court's holding in *Elliott* that an arbitral ruling unreviewed despite available review may be given preclusive effect. The holding in *Wehrli* demonstrates the importance of the availability of judicial review and as a corollary to enable review, a written record. The procedural facts raised the issue squarely.

If petitioner were to succeed here, the new holding of this Court would be that even an unreviewable arbitral decision may be given preclusive effect, as long as the party to be charged voluntarily elected the forum. Refining the test of voluntariness would be the inevitable next stage. There is no reason in equity or jurisprudence why the law should take this path.

The Ninth Circuit resolved the issue before it correctly, without disturbing precedent of this court or other

circuits on the other important factors and criteria governing issue preclusion. The decision need not be revisited by this Court, and the petition may properly be denied.

Respectfully submitted,

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